No. 13096

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., INC.,
a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corporation, and HOME INSURANCE COMPANY, a corporation,

Appellees.

Petition for Rehearing
On Behalf of Appellant

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PETITION FOR REHEARING ON BEHALF OF APPELLANT

Appellant respectfully petitions the Court for a rehearing in the above cause upon the ground that the opinion of the majority of the Court is erroneous both in fact and law.

Because of the very important economic implications of the majority opinion, which we will point out in conclusion, we have made a more detailed analysis of the majority opinion than is normally done in a petition for rehearing (References to the opinion are to the pages of the printed opinion furnished by the Clerk of this Court).

I

The basic question before the Court is whether or not the thirty-nine (39) gin yard receipts, which on their faces purport to be negotiable warehouse receipts, should be enforced according to their express terms. The majority says not because it concludes that they were not intended to be used "for other than identification purposes". (Op. 3), i.e. they were not intended by the parties to be negotiable contracts which they purported to be. In support of this conclusion the majority gives the following reasons which we follow with our statement as to why we conceive the reason to be in error. For convenience the original contract will be referred to as "contract" and the gin yard receipts as "receipt".

1 - "We think reference to gin-yard receipts in the contract was in connection with the technique of reimbursement adopted by the parties and in that connection only." (Op.2)

We submit that the fact that the reference to gin-yard receipts in the contract was in connection with the technique of reimbursement only, can have but little, if any, bearing upon the legal effect to be given to the receipts actually delivered, particularly in view of the fact that the receipts, on their faces, purport to be negotiable warehouse contracts.

2 - "Its use signifies a convenient means to enable the purchaser to acquire possession and control of the cotton." (Op.2)

This is true, but inasmuch as the receipt, if construed as an enforceable negotiable contract, would be a still more convenient means to enable the purchaser to acquire possession and control, we submit that its use for that purpose does not negative or tend to negative an intent that the receipt be effective in accordance with its terms.

3 - "The receipts contained a space for unpaid charges and following the line which read '(1) Ginning, Bagging and Ties, Storage and Insurance for first twenty days $ . . . . . .' Eloy wrote 'Pd', indicating its realization that the forms were essentially being used for a purpose that was inappropriate since the depositor and receiver of the cotton were, at the time of issuance of the receipt, the same entity." (Op.2-3)

The majority has here overlooked the following evidence in the record:

"Q. Now, each of these documents show at (11) the bottom, has a notation 'Ginning, Bagging and Ties, Storage and Insurance for first 20 days,' marked 'paid'. For whom are they paid and how?

* * * * * *

A. The first 20 days insurance is normally and usually paid by the producer or the farmer, the customer of the gin.

Mr. Fennemore: That is the custom of the trade?

A. *That is the custom of the trade of all gins in Arizona so far as I know.*" (emphasis supplied) T. R. 129

The "pd" was placed in the blank not as an indication that Eloy realized the forms were inappropriate but to evidence the actual fact that the producer, in accordance with "the custom of the trade of all gins in Arizona", had paid the insurance for the first 20 days.

4 - "The fact is that Eloy used a standard form of gin-yard receipt whose literal provisions were inapplicable to this transaction because of the express agreement as to insurance." (Op. 3)

We respectfully submit the Court is here in error because the only *express* statement in the contract was "Insurance at sellers risk until payment completed". After payment the contract was silent. The receipt says the cotton has been insured while stored. If before payment that agrees with the *express* words in the contract. If after payment it is not in conflict with any *express* words in the contract.

5 - "If the agreement Smith contends for was in effect, it is difficult to understand why the receipts were not couched in terms of charges to be levied and insurance made effective from the time payment was made for the cotton, in accordance with the terms of the contract of sale, rather than in terms of a 20-day period." (Op. 3)

As we have shown under 3 above, the receipt contained the 20 day "pd" period because the producer had paid for the first 20 days.

6 - "Smith made no showing as to its practice in the use of the receipts, that is, whether in selling the cotton it purchased it would use the mechanism of endorsing the receipts over to its purchaser. On the contrary, the only suggestion in the record is that when the cotton purchased from Eloy was sold Smith sent it out under bills of lading, which negatives any intended use of the receipts for other than identification purposes". (Op. 3)

If we understand this language correctly what the majority is here saying is that before the holder of a receipt, which on its face purports to be a negotiable contract, can enforce it according to its terms, he must first show that it was his practice to actually negotiate the receipts, and that in default of such showing it will be presumed that the receipts were only for identification—and not what they purported to be—negotiable enforceable contracts. We submit that this is an entirely novel doctrine in Anglo-American jurisprudence and we further submit that the unilateral practice or intent of Smith cannot determine whether the receipts were or were not contracts.

II

The balance of the opinion of the majority commencing at the bottom of page 3 appears to be directed to corroborating the conclusion previously reached that these receipts were not intended as negotiable contracts in accordance with their express terms, but merely as "no risk" parking tickets for identification only.

Paraphrased, these are the points raised by the majority and the answers thereto:

(A) The custom at Dallas, not controlling at Phoenix, assists in determining *Smith's* purpose in limiting Eloy's liability to time of payment. (Op. 4)

A - (1) In the field of contracts unilateral purpose or intent is immaterial.

(2) The provision as to insurance did not *limit* Eloy's liability. If no such provision had been made Eloy would not have stood the risk of loss after payment because concurrently with payment the receipt was delivered to Smith and the property (title) in the goods passed. Under the Uniform Sales Act (Sec. 52-524, Arizona Code, 1939) the goods are at buyer's risk when the property therein is transferred to buyer, whether delivery has been made or not. But, had Eloy unconditionally appropriated the bales of cotton to the performance of the contract before payment, the property would thereupon pass to Smith. Uniform Sales Act (Sec. 52-518, Arizona Code, 1939). There was bound to be a lapse of time between the unconditional appropriation by endorsing the receipt, making out and attaching the draft, transmitting it to the Valley Bank at Phoenix and payment being made there. Consequently, the provision *in* the contract did not *limit* but *extended* Eloy's liability.

(B) If Smith relied on Eloy to furnish insurance why is there no evidence that Smith paid for insurance on the other 1260 bales? (Op. 4)

A - (1) If there was a *contract* for insurance after payment on these 39 bales what was or was not done on the other 1260 bales is immaterial. If there was no contract it is still immaterial.

(C) If Smith's contention is correct, it is *reasonable to assume* that Eloy would have billed and Smith paid insurance costs *at time of delivery.* (Op. 4)

A - (1) Appellant offered to prove (T.R. 133) that insurance charges by the custom of the trade were billed at some date after delivery and that Smith and Eloy understood that this practice would be followed in connection with these transactions and had bills been rendered they would have been paid.
The proffer was rejected (T.R. 134) and the failure to allow the evidence proffered was made a point upon appeal (T.R. 62) and a specification of error (Appellant's Brief, p. 8). In the face of this proffered evidence why is it reasonable to assume something to the contrary?

(D) Why did not Smith rely on gin receipts to protect it against loss *before* payment? (Op. 5)

A - (1) Before payment the gin receipt had not been delivered to Smith. Even appel-

lant does not claim that the receipt, negotiable in form, could give Smith any rights until delivery to it.

(E) Smith carried insurance which protected it after payment (Op.6).

A - (1) As pointed out in the dissenting opinion (Op. 8) Smith's policy excluded "cotton on which any * * * bailee has insurance which would attach if this policy had not been issued * * *" (T.R. 98). Does the majority opinion mean to hold that the Home Insurance policy did not cover this cotton? This point was not discussed in the briefs nor covered in the oral argument and before the Court so holds, it should have the benefit of complete presentation by counsel.

(F) Smith did not intend to pay a *double* insurance premium for insurance carried by Eloy. (Op. 6)

A - (1) As noted under (C) above Smith offered evidence to show that under the custom of the trade, in the light of which the two parties contracted, it was obligated to and would or did pay insurance charges when billed by Eloy. (T.R. 133). Should this Court approve the rejection of the proffered evidence and then, from the absence of it in the evidence admitted in the record, say that the contrary is true? We submit that it should not.

(G) The proffered evidence was immaterial. (Op. 6)

A - (1) The foregoing discussion, we submit, shows that it was material.

This petition is overlong and for that we apologize, but we feel that the implications of the majority opinion are of an economic importance far beyond the loss or gain of the four thousand odd dollars involved in this action.

The majority opinion says that some 1300 gin yard receipts delivered by a warehouseman Eloy to Smith purporting on their faces to be negotiable warehouse contracts are not contracts at all, but merely "no risk" parking tickets because they were issued pursuant to a prior purchase contract which said "Insurance at sellers risk till payment completed". As the majority opinion notes, Smith is a large operator in the cotton field and it would be normal for it to have such receipts in its possession, and if the conduct of its business so dictated to negotiate the same to others. If the opinion of the majority stands, it is notice to all purchasers of such receipts from Smith that before they can safely purchase such receipts that they must first investigate the circumstances under which the receipts were issued. This will obviously defeat the commercial purpose of negotiability in warehouse receipts. Nor need its effects be limited to Smith. It is not unreasonable to assume that the practices and routine contract forms in the field of the cotton industry are fairly well standardized and therefore, the opinion of the majority may well

cause at least, uncertainty in the commercial cotton field from Anderson Clayton Company, the largest in the world, down to the smallest.

We respectfully submit that a rehearing should be granted.

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CERTIFICATE

The undersigned attorneys for Appellant hereby certify that they prepared the foregoing "Petition for Rehearing on Behalf of Appellant"; that they know the contents thereof, and that in their judgment and in the judgment of each of them the said petition is well founded and that it is not interposed for delay.

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